No. 97-546

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In The

Supreme Court of the United States

October Term, 1997

FIGTER LIMITED,

Petitioner,

vs.

TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE SUPREME COURT:

Respondent, Teachers Insurance and Annuity Association of America ("Teachers"), submits this brief in opposition to the petition for a writ of certiorari submitted by Petitioner, Figter Limited (the "Debtor").

INTRODUCTION

The Ninth Circuit Court of Appeal's decision, Figter Ltd. v. Teachers Insurance and Annuity of Association of America (In re Figter Ltd.), 118 F.3d 635 (9th Cir. 1997), attached as Appendix A to the petition, involves the interpretation of §§ 1126(c) and 1126(e) of the Bankruptcy Code and the application of those provisions to the situation where an oversecured creditor (Teachers), who is a pre-existing creditor and not a competitor of the debtor nor a plan proponent, purchases unsecured claims by offering to purchase all non-insider unsecured claims for one-hundred cents on the dollar with the intent of blocking confirmation of the debtor's plan which it legitimately believes is not in its best interests.

The Ninth Circuit Court of Appeals concluded that the bankruptcy court did not err in either its factual or legal determinations that Teachers' acquisition of the unsecured claims was made in "good faith" within the meaning of § 1126(e) and that Teachers should be entitled, pursuant to § 1126(c), to one vote per purchased claim.

Because Figter does not conflict with a decision of another court of appeals, does not decide a federal question in a way that conflicts with applicable decisions of this Court, and does not decide an important question of federal law which has not been, but should be, settled by this Court, this Court should deny the Debtor's petition for writ of certiorari.

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STATEMENT OF THE CASE

The Debtor filed a voluntary petition on May 27, 1993. (Petitioner's Appendix ("App.") C, 3.) The Debtor's primary asset is a 198-unit multi-family residential apartment complex (Skyline Terrace) located in downtown Los Angeles (the "Property"). (App. C, 5.) Teachers is a pre-existing creditor by virtue of a $15.6 million promissory note, executed by the Debtor in favor of Teachers on April 29, 1989, and secured by a first trust deed lien on the Property. (App. C, 5.)

The Debtor's plan of reorganization, filed on December 23, 1993, (the "Plan") proposes to convert the Skyline Terrace into condominiums, with a sales program of approximately three years, and with Teachers to release portions of its lien as individual condominiums are sold. (App. C, 6.)

The Plan classifies Teachers' secured claim in Class 2 and classifies the unsecured claims in Class 3. Class 2 and Class 3 were the only impaired classes. (App. C, 6.)

Because Teachers would not vote to approve the Plan, Class 3 represented the only potential consenting impaired class.

During the period October 27, 1994 through October 31, 1994, Teachers offered to purchase *all* of the Class 3 unsecured claims for *one-hundred cents on the dollar*. (App. C., 8, 19, and 20.) During this period, Teachers purchased twenty-one of the thirty-six unsecured claims classified in Class 3 at one-hundred cents on the dollar for a total of $14,588.62. (App C, 8.) On or about November 23, 1994, Teachers filed with the Clerk of the Bankruptcy Court Notices of Transfer of Claim as required by Rule 300(1)(e)(2) of the Federal Rules of Bankruptcy Procedure. (App. C, 8 and 20.) On or about December 14, 1994, the Clerk of the Court served its Notice of Transfer of Claims on Teachers, the transferors, and the Debtor. (App. C, 8.) No objection was filed by any transferor within the twenty-day period provided for in Rule 3001(e)(2). (Id.)

Teachers was not a plan proponent when it purchased the claims. (App. C, 18, 20, and 22.) When, on August 24, 1994, the bankruptcy court determined that Teachers was oversecured, Teachers, whose plan was premised on the belief that Teachers' claim was undersecured (App. C, 7 and 18), was no longer a competitor regarding the Debtor's plan. (App. C, 18.) The record is void of any effort by Teachers subsequent to August 24, 1994 to propose its own amended plan. (App. C, 8 and 18-19.) Thus, at the time Teachers purchased the claims, its plan was no longer in competition with the Plan. Accordingly, the Debtor's assertion that "the secured creditor was a plan proponent at the time it made the purchases" (Petition, 13) is a misstatement of fact.

If Teachers is allowed to vote each of the claims it purchased, the Plan will be unconfirmable on its face, as the Debtor will be unable to meet the requirements of 11 U.S.C. § 1129(a)(10), i.e., the existence of an impaired consenting class of claims, and, therefore, the Debtor will be unable to cramdown Teachers' secured claim under § 1129(b). (App. C, 5.)

Teachers' acquisition of the claims, made with the intent of rendering the Plan unconfirmable, was not motivated by an ulterior or coercive motive (App. C, 16 and 18): (1) the record is void of any evidence of any pure malice or blackmail (App. C, 18); (2) the record does not support a finding that Teachers' acquisition of the claims was part of a scheme to destroy the Debtor since Teachers is not a competitor of the Debtor (Id.); and (3) the inability of the Debtor to confirm a plan will not eliminate pending state court lender liability action brought by the Debtor against Teachers, which action is based on the Debtor's allegations that Teachers wrongfully refused to enter into a restructuring of the Debtor's obligations to Teachers (App. C, 22).

Instead, Teachers was motivated by a genuine concern to protect its own self interests as a pre-existing creditor: Teachers holds a legitimate belief that the Plan, if confirmed, would expose it to significant risks not bargained for when it made the loan to the Debtor and that, therefore, the Debtor's attempt to cramdown its secured claim is not in Teachers' best interests. (App. C, 16, 18, ,19, and 20.)

These factual findings, entered by the Bankruptcy Court and affirmed by both the District Court and the Court

of Appeals, should not be unsettled by this Court. See Goodman v. Lukens Steel Co., 482 U.S. 656, 665 (1987).

ARGUMENTS FOR DENYING THE PETITION

A. The Ninth Circuit Court Of Appeals, In Figter, Did Not Enter A Decision In Conflict With A Decision Of Another Court Of Appeals.

Figter does not conflict with a decision of another court of appeals. The Debtor does not suggest otherwise.

B. The Ninth Circuit Court Of Appeals, In Figter, Did Not Decide A Federal Question In A Way That Conflicts With Applicable Decisions Of The Supreme Court.

1. The Ninth Circuit Court of Appeals' interpretation of § 1126(e) does not conflict with any applicable decision of the Supreme Court.

Contrary to the Debtor's assertions, Figter, in interpreting "good faith" within the meaning of § 1126(e) to include purchases of unsecured claims by an oversecured creditor with the intent to block confirmation of a plan, does not conflict with Pioneer Investment Services Co. v. Brunswick Assoc. L.P., 507 U.S. 380, 389 (1993) or Young v. Higbee, 324 U.S. 204, 210-11 (1945).

First, Pioneer Investments is not applicable. Pioneer Investments does not hold, let alone state, that a court must interpret language left undefined by Congress in the Bankruptcy Code (e.g., "good faith" in § 1126(e)) in a manner that insures that a debtor will successfully reorganize. Pioneer Investments merely describes a bankruptcy court's general equitable powers:

> bankruptcy courts are entrusted with broad equitable powers to balance the interests of the affected parties, guided by the overriding goal of insuring the success of the reorganization.

507 U.S. at 389. As this Court makes clear in Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 207 (1988), a bankruptcy court's equitable powers can only be exercised within the confines of the Bankruptcy Code and cannot be used to interpret the Code with a debtor's green glasses:

> whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code. . . . The Court of Appeals may well have believed that [the Lender] or other unsecured creditors would be better off if [the debtors'] reorganization plan was confirmed. But the determination is for the creditors to make in the manner specified by the Code. 11 U.S.C. § 1126(c).

Because Figter involves the interpretation of the Bankruptcy Code and not a bankruptcy court's exercise of its equitable powers, Pioneer Investments is not applicable.

Second, the Ninth Circuit Court of Appeals' interpretation of § 1126(e) does not conflict with Young. This Court, in Young, in discussing § 203 of the Bankruptcy Act, the predecessor to § 1126(e), did not hold that a creditor's acquisition of claims to block confirmation of a plan is not "good faith." Instead, this Court explained that this provision was intended to apply to those

> whose selfish purpose was to obstruct a fair and feasible reorganization in the hope that someone would pay them more than the ratable equivalent of their proportionate part of the bankrupt assets.

324 U.S. at 211 (emphasis added). This Court further elucidated the legislative history of § 203 in footnote 10:

> A year before the House Committee on the Judiciary held its extensive hearings on the Chandler Act a Circuit Court of Appeals held that a creditor could not be denied the privilege of voting on a reorganization plan under Sec. 77B, although he bought the votes for the purpose of preventing confirmation unless certain demands of his should be met. Texas Hotel Corporation v. Waco Development Co., 5 Cir., 87 F.2d 395. The hearings make clear the purpose of the Committee to pass legis-

> lation which would bar creditors from a vote who were prompted by such a purpose. To this end they adopted the 'good faith' provisions of Sec. 203. Its purpose was to prevent creditors from participating who 'by the use of obstructive tactics and hold-up techniques exact for themselves undue advantages from the other stockholders who are cooperating.' Bad faith was to be attributed to claimants who opposed a plan for a time until they were 'bought off'; those who 'refused to vote in favor of a plan unless . . . given some particular preferential advantage.' Hearings on Revision of the Bankruptcy Act before the Committee on the Judiciary of the House of Representatives, 75th Cong., 1st Sess. on H.R. 6439, Serial 9, pp. 180-182.

The Ninth Circuit Court of Appeals, in interpreting § 1126(e) to mean that a creditor's purchases of claims are made in "good faith" when the purchases are made with the motivation of protecting the creditor's economic interests as a pre-existing creditor as opposed to an ulterior motive such as blackmail, strike, or malice, is entirely consistent with Young. Indeed, Figter consistently follows Young and the line of cases which, with the guidance of Young, have interpreted § 1126(e). (App. A, 5-7) (following Young and the line of cases interpreting § 1126(e) with the guidance of Young: 255 Park Plaza Associates Ltd. Partnership v. Connecticut General Life Ins. Co. (In re 255 Park Plaza Associates, Ltd. Partnership), 100 F.3d 1214, 1219 (6th Cir. 1996); Insinger Machine Co. v. Federal Support Co. (In re

Federal Support Co.), 859 F.2d 17, 19 (4th Cir. 1988); In re Marin Tower Ctr., 142 B.R. 374, 378-79 (N.D. Cal. 1992); In re Holly Knoll Partnership, 167 B.R. 381, 385-86 n. 4 (Bankr. E.D. Pa. 1994); In re Landing Associates, Ltd., 157 B.R. 791, 803 (Bankr. W.D. Tex. 1993); In re Applegate Property, Ltd., 133 B.R. 827, 834 (Bankr. W.D. Tex. 1991); In re Allegheny International, Inc., 118 B.R. 282, 288-89 (Bankr. W.D. Pa. 1990); In re Gilbert, 104 B.R. 206, 215-16 (Bankr. W.D. Mo. 1989); In re A.D.W., Inc., 90 B.R. 645, 648 (Bankr. D. N.J. 1988); In re MacLeod Co., 63 B.R. 654, 655 (Bankr. S.D. Ohio 1986); In re Landau Boat Co., 8 B.R. 432, 433-34 (Bankr. W.D. Mo. 1981)).

2. The Ninth Circuit Court of Appeals' interpretation of § 1126(c) does not conflict with any applicable decision of the Supreme Court.

The Ninth Circuit Court of Appeals, in Figter, interpreted § 1126(c) to mean that a creditor is entitled to one vote for each of its purchased claims, which interpretation is supported by the two other decisions that have addressed this issue: In re Concord Square Apartments, 174 B.R. 71, 74-75 (Bankr. S.D. Ohio 1994), and In re Gilbert, 104 B.R. at 211. The Ninth Circuit Court of Appeals' conclusion is based on the plain language of § 1126(c) which states that "claims" and not "creditors" are counted:

> [a] class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in

> amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this Section, that have accepted or rejected such a plan. [Emphasis added.]

Because the language of § 1126(c) is not ambiguous, and because, in any event, the old law to which the Debtor refers is either inconsistent with the language of § 1126(c) or not relevant to the issue of counting claims for the purpose of accepting or rejecting a plan, Dewsnup v. Timm, 502 U.S. 410 (1992), is not applicable. The Ninth Circuit correctly so reasoned. (App. A, 9-10.) Indeed, to do otherwise would run afoul of this Court's dictate in United States v. Ron Pair Enterprises, 489 U.S. 235, 241 (1989) that "judicial inquiry is complete" when the words of a statute are unambiguous.

C. The Ninth Circuit Court Of Appeals, In Figter, Did Not Decide An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By The Supreme Court.

The Bankruptcy Code represents Congress' delicate balance of the rights of debtors and the rights of creditors, which balance this Court should not upset. See Beezley v. California Title Co. (In re Beezley), 994 F.2d 1433, 1439-40 (9th Cir. 1992) (O'Scannlain, J., concurring). A creditor's ability to purchase claims, and the concomitant ability of a creditor to sell its claim, further the creditor control principle embodied by the Bankruptcy Code and recognized by this Court. See Phoenix Mutual Life Ins. Co. v. Greystone III

Joint Venture (In re Greystone III Joint Venture), 995 F.2d 1274, 1283 (5th Cir. 1991) (citing Ahlers, 485 U.S. at 206). Indeed, where, as here, the secured creditor offers to purchase all of the claims of noninsider creditors for one-hundred cents on the dollar, all noninsider creditors benefit. This situation is not the "free-for-all" feared by the bankruptcy court in Applegate where creditors will not be paid equally, where fraud and corruption will be invited, and where a creditor will purchase claims in exchange for forbearance in potential violation of the federal securities laws. Instead, it affords every noninsider creditor of the debtor the option of having their claims paid in full.

Congress embued this creditor control principle in § 1126(e), which, as elucidated by the legislative history and the relevant and unanimous case law, makes it clear that a creditor, such as Teachers, acts in good faith when it purchases claims to preclude confirmation of a plan when its action is motivated by a desire to protect its economic interests as a pre-existing creditor and not by an ulterior purpose. Even though a creditor's ability to vote claims that it purchased often frustrates the efforts of a debtor, especially a single asset real estate debtor, to successfully reorganize, the Debtor's concern is one that the Debtor should raise with Congress and not this Court. If such purchases risk the loss of a debtor's equity through liquidation or foreclosure, the solution may be found in the economics of the marketplace, e.g., obtaining alternate financing, not in the judicial rewriting of the Bankruptcy Code.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari does not present a compelling reason for this Court to grant certiorari. Respondent respectfully requests this Court to deny the petition.

Dated: October 29, 1997

Respectfully submitted,

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